American Wire Products, Inc. *and* Roger Peach. Case 9–CA–29933

March 3, 1994

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND TRUESDALE

On September 30, 1993, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The Respondent filed exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, American Wire Products, Inc., Frankfort, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

''(a) Offer Tracy Brown, Keith Cook, Gary Estes, Mark Freeman, Johnny Gentry, Garrett Neace, Roger Peach, Jeff Rice, Jeff Smith, and Homer Stamper immediate and full reinstatement to their former positions of employment or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.''

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
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> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten our employees that the plant will close if they unionize.

WE WILL NOT terminate employees or otherwise discriminate against them because of their union activities or other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL offer Tracy Brown, Keith Cook, Gary Estes, Mark Freeman, Johnny Gentry, Garrett Neace, Roger Peach, Jeff Rice, Jeff Smith, and Homer Stamper immediate and full reinstatement to their former positions of employment or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL remove from our files any reference to the terminations of the employees named above and notify them in writing that this has been done and that evidence of the unlawful terminations will not be used against them in the future.

AMERICAN WIRE PRODUCTS, INC.

James E. Horner, Esq., for the General Counsel.
Donald P. Wagner, Esq., of Lexington, Kentucky, for the Respondent.

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. We also find no merit to the Respondent's contentions that the judge was biased against the Respondent and that he refused to allow it to fully develop its theory of the case at the hearing.

In affirming the judge's finding that the Respondent's mass discharge of union supporters was unlawfully motivated, we find it unnecessary to rely on the statement in the Respondent's employee handbook that ''Our Company is a nonunion organization, and it is our desire that we always will be.'' In affirming the judge's finding that the Respondent failed to demonstrate that it would have discharged the employees even if they had not engaged in union activities, we do not rely on his discussion of possible modifications of the employment at will relationship under Kentucky state law.

We correct the judge's citation to *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[2] We shall modify the judge's recommended Order to conform his reinstatement language to that traditionally used by the Board. In addition, we shall substitute a new notice.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Frankfort, Kentucky, on June 15 through 17, 1993. Subsequent to an extension in the filing date, briefs were filed by the parties. The proceeding is based on a charge filed September 15, 1992,[1] by Roger Peach, an individual from Harrodsburg, Kentucky. The Regional Director's complaint dated October 23, 1992, alleges that Respondent American Wire Products, Inc., of Frankfort, Kentucky, violated Section 8(a)(1) and (3) of the National Labor Relations Act by threatening to close Respondent's plant because of the employees' union activities and by discharging 10 named employees on September 8 and 9, 1992, because of union and concerted activities by employees.

On a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation engaged in the production of fabricated metal products at its Frankfort facility. It annually ships goods valued in excess of $50,000 from its location to points outside Kentucky and it admits that at all times material it has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. Although it does not admit that the International Association of Machinists and Aerospace Workers, AFL–CIO is a labor organization as defined in Section 2(5) of the Act, a union official testified at the hearing regarding the Union's activities and I find that it validly meets the criteria of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

Craig Chamberlain is Respondent's president and majority shareholder. On June 6, 1990, he purchased the assets and took over the business of Southern Moldings, Inc., a company then in receivership and he initially retained the predecessor's 96 employees. The equipment Respondent purchased from the bank was essentially antiquated and poorly maintained as was the plant structure itself. Some efforts have been made to maintain, repair, or modernize equipment, however, the plant itself (which is leased from the bank from which the other assets were purchased) remains in poor condition, especially with respect to significant roof leaks.

Carol Chamberlain, wife of the owner, serves the Company as director of human resources and, in November 1991, Respondent hired Ken Krebs as director of operations. The Company initially was unprofitable but it had sales growth in 1991 and reached ''marginal'' status. In 1992 it continued efforts for business growth and other improvement. It also directed its attention to employee incentives and discipline and it modified its attendance policy effective January 1, 1992, as described in a new employee handbook. Each employee was required to ''certify'' that he received a copy of the handbook and that he understood that it was not a contract of employment and that he could be terminated for any reason at any time.

The attendance policy provided for termination after the fifth absence or fourth instance of tardiness. The policy was modified effective March 23, to clarify a 2-hour call-in policy. In June 1992 the Company instituted a policy where employees were not to leave their workstations even to go to the restroom, without their supervisor's permission. In July a no-smoking drug testing policy was announced to become effective September 15.

By August employee discontent began to grow over some of the working conditions and two separate groups of employees, unknown to each other, began talking about and considering union representation. When first-shift employees learned that second-shift employees had already taken the first step toward contacting union representatives, they decided to join with the second-shift employees in seeking Machinists Union representation. Employee Jeff Rice then made arrangements with Ron Harsh, a business representative from the Machinists Union, and a meeting was held on August 24, at the home of Tracy Brown and Gary Estes with Jeff Smith, Roger Smith, and Jeff Rice also in attendance. After the meeting these employees agreed to proceed with an organizing campaign and Harsh later delivered 100 blank authorization cards to Brown's house. The employees began distributing the cards among their coworkers. On September 2, Keith Cook signed a card given to him by Rice. (Cook was also the first employee to be discharged, 6 days after signing the card.) On September 3, other authorization cards were signed by Roger Peach, Brown Estes, and Rice, and on September 4, by Johnny Gentry. Jeff Smith testified that he signed a union card which he gave to Homer Stamper 2 or 3 days before he was fired.

Mark Freeman was given a union card by Roger Peach the day before he was fired. Freeman testified that he took the card home where he signed it but never had a chance to turn the card back in because he was then discharged with the others.

On Tuesday afternoon, September 8, Respondent's supervisor held a regular weekly production meeting. Toward the end of that meeting Operations Director Ken Krebs came in and discussed some plant matters with the supervisors. Employee James Myers, a quality assurance auditor, and the only nonsupervisor at the meeting, testified that Krebs told the group that there were rumors of a union in the plant and then warned that he had to deal with Chamberlain every day and that ''it was his considered opinion that if a union was voted in, Craig (Chamberlain) would close the doors.'' Krebs then told the supervisors that ''he had a list of people that he didn't feel were doing themselves or the company any good being there'' and asked them to get their list of such employees and they would then compare their lists. After the meeting ended, Myers went to Krebs' office where they talked privately. Myers brought up the subject of the Union to Krebs, saying that he didn't know much about it, and didn't even know if anything would ever come of it. Krebs then asking Myers if Myers would feel comfortable telling him ''who was doing union activity.'' Myers, who had talked with Johnny Gentry (one of the terminated card signers) about the Union on September 4, declined to give Krebs any answer and the conversation ended.

[1] All following dates will be in 1992, unless otherwise indicated.

The Respondent's witnesses describe meetings between the Chamberlains and Krebs in June, on September 2 and finally on September 8 which traced Owner Chamberlain's described dissatisfaction with the way his policies and directions were being carried out on the plant floor. Chamberlain testified that this dissatisfaction was directed at the supervisors' reluctance or inability at times to be as decisive and to follow the directions and the practices of the business. He said he then directed Krebs and his wife to identify and develop those employees that they felt ''if we were to terminate them, that we could improve the overall effectiveness of the floor,'' either through hiring if required, new individuals, or just no longer having those individuals.

Carol Chamberlain (C. Chamberlain) recalled that during the September 2 meeting they did not identify any individuals but her husband complained that he was tired of hearing ''about situations on the plant floor.'' When asked what kind of situations was her husband referring to, she replied, ''People with attendance problems, people that were always complaining, people that were still complaining about the wage scale, people that did not like the policies in effect.'' When questioned further about the complainants, C. Chamberlain admitted that ''no person came to me and specifically complained,'' and added that the complaints were relayed to her by supervisors. C. Chamberlain testified that she discussed people but did not recommend the name of even one employee to be fired, but said that Krebs read off the list of 10 names of those to be fired. Four second-shift employees were terminated that Tuesday evening shortly after the meeting. The other six first-shift employees were terminated the next day shortly after their shifts began. The first terminated was Keith Cook, a machine operator, who had worked at the plant for 12 months before his discharge. He testified that at exactly 5:30 p.m. (near the start of the second shift) he was taken to Krebs' office. There Krebs announced that he had some good news and some bad news for Cook. The ''good news'' for Cook was that Respondent was going to pay him for the rest of the week. The ''bad news'' was that Cook was fired, as of that moment. Krebs told Cook that Cook ''didn't fit their standards there at American Wire.'' Cook was stunned at the announcement and asked why was he being fired, and added that he had made his production quotas, and had not been late to work. All Krebs would reply was ''I don't have to give you a reason; just leave the building.'' Cook told Krebs he just didn't understand why he was being fired. Krebs told him, ''I don't have to give you a reason. Now, get out of my building . . . just get your stuff and get the hell out of my building.''

The same ''good news, bad news'' scenario was repeated with each dischargee and Krebs admitted keeping to that dialogue and further admitted that he would not give any reason to the employees for their discharges; ''unless they pressed me for one. I wasn't interested in spending any more time discussing reasons.''

Tracy Brown testified that after Krebs gave her the bad news, she asked him, ''If it had anything to do with my job performance'' and he told her: ''It had nothing to do with my job. He said he felt like he could find somebody better to do the job that I did for the same amount of money.'' When she asked for a written explanation of her discharge; Krebs refused. Jeff Smith was told by Krebs that ''It's like you trying to find another job. We're trying to better ourselves. The same basic comments from Krebs was the only reason given to: Jeff Rice, Roger Peach, Garrett Neace, and Gary Estes. When Estes asked Krebs if his discharge had anything to do with his job performance, Krebs said ''No, you're a good worker'' and told Estes that under state law, he did not have to give them a good reason for discharging them. Krebs also told Stamper that his discharge had nothing to do with his work performance. Even though Krebs told Mark Freeman had done a good job with Respondent, Krebs said ''We don't have any reason to fire you. We just feel that the company is better off without you.'' One of the last to be fired was Johnny Gentry, who had heard what was happening. When Krebs went through the ''good news, bad news'' routine with Gentry, he added that Gentry's discharge didn't have anything to do with Gentry's job performance. At that point Gentry accused Krebs of firing him over the Union, Krebs response was to ''give a smirking-looking grin,'' raise his hands, and shrug his shoulders.

Sales Manager Robert Miller observed the string of discharges during the morning of September 9, and asked a foreman what was happening and was told, ''Krebs was having a field day of firing people.'' Miller testified that he went to Chamberlain to find out what was going on because Miller was concerned about the manpower requirements for filling a large new Matsushita contract he had just obtained and he was worried because Respondent had produced only ''a small portion of what we could have'' the previous month because of ''not having enough people to run the jobs and then all of a sudden I find out that we are discharging ten or twelve people. . . . I questioned that at the time we let those people go we were desperate.'' (Krebs also testified that during the production meeting on the afternoon of September 8, a supervisor had ''started off with telling me about two or three customers that they knew they're not going to be able to make it if I'm terminating people.'') Miller testified that both Chamberlain and Krebs were in Chamberlain's office and he asked them why they were they discharging employees and one of the two (he could not recall which one), replied, ''There was a union movement and it had to be nipped in the bud.''

On brief the Respondent relates that by June 1992 Krebs realized that there were two dozen people that he would rather not have in the Company either because of lack of effort of lack of interest in solving their own problems and, furthermore, that supervisors were using employee problems as excuses, instead of solving the problems. Some of the employees that Krebs identified had ''attendance problems'' and some didn't (these ''attendance problems'' were said to exist not because they had gone beyond the policies in Respondent's handbook but because their was a possibility that they might before the end of the year). Some were suggestion award winners or had been recognized as having done well in the first quarter of the year so that they got a company ''leader'' award; but ''some'' of these employees were alleged to be inconsistent and with no interest in improving themselves or the area that they were working in. Respondent also states that the supervisors were not helping Krebs deal with these problems by formally advising the employees of their shortcomings or terminating them for the negative things that they were doing. Krebs' actual selection ''criteria'' was his opinion of those employees where he thought the company could either hire someone who could do the job

as well, if not better, or the company would be better by just no longer having that individual as a member of its work force.

Krebs said he started his selection by first identifying employees whom he wanted to keep so he started with the top 50 percent of people that he would hire first. He said he ''basically'' focused his attention on the material handling side of the business where he had the most problems and he looked at each area within the material handling department and asked himself if employees were going to be any better 6 months down the road. He got input from Carol Chamberlain only with regard to attendance because he was interested on how close these employees were to being terminated anyway because of attendance problems. He also got ''feedback'' (otherwise undocumented and uncorroborated) from the supervisors and from the manager of the material handling area. When Krebs told supervisors on September 8 that terminations would be made in the next 24 hours, he also advised them that because within the next week the drug testing and no-smoking policies would go into effect, there could be problems on the floor and he wanted feedback from the supervisors with regard to anticipated problems. He also agreed that after the Union was mentioned, he advised the group that the Company had a policy concerning unions in its handbook and asserts that he said that there were laws that protected workers and their right to unionize.

Although the Respondent made no initial attempt to contend that those discharged were poor employees, it did ask questions in this area on cross-examination and did introduce a number of ''Employee Warning Notice'' forms on subjects including tardiness, safety, absence, disobedience, and carelessness.

Otherwise, the record shows that two of the dischargees, Tracy Brown and Garrett Neace, were recipients of awards in the Company's leadership program, a program first announced in January 1992. Only a small number of employees could qualify for the leadership program because, according to Carol Chamberlain, ''our employees at that time were unable to meet all of those guidelines (these guidelines requirements were in the areas of attendance, production, safety, suggestions, cleanliness, and quality), because many of the employees had difficulty in ''the area of attendance, production suggestions, and quality.'' Conversely, the Chamberlains were reluctant to praise any of the ''leaders'' and they were downgrading the selection by saying that some of the recipients ''are average, some above average, and some outstanding under the criteria . . . and, that Brown and Neace were average.'' When asked on cross-examination if the ''leaders'' were employees worth keeping, Craig Chamberlain replied, ''I don't have that regard for that program, no.'' Krebs, the originator of the leadership program also disavowed it as a measure of employee worth.

The first recipients of the Leader program were announced at a meeting of all the employees in late June and the recipients were given caps and T-shirts designating them as A.W.P. Leaders.

The letter which accompanied the award said:

> As an AWP Leader you are being recognized by Ken Krebs for your leadership in the areas of attendance, cleanliness, production, quality, safety and suggestions. You more than the other workers have shown continuous improvement and attention to each of these areas. And improvement in each of these areas, through discipline and drive on your part, leads to valuable contributions to your Company.
>
> I now encourage you to encourage your fellow AWP worker to strive to become and AWP leader just like you. You are in a select group and are an example for them to follow.

In addition to the leader program, Respondent had also rewarded employees who had taken an interest in the Company by making suggestions on ways to improve the Company that were accepted by having their pictures taken (with Chamberlain) and awarding a check for $25 in addition to a T-shirt.

In the first 9 months of 1992, 176 suggestions were submitted from 54 different employees. These suggestions included those from dischargees Brown (12), Cook (5), Estes (6), Freeman (2), Neace (2), Peach (2), and Stamper. (Carol Chamberlain, however, said only 10 persons submitted more than one suggestion.) During this period 80 checks for $25 were given out for implemented suggestions. Several of these checks went to Freeman, Neace, Peach, and Stamper. Several of these employees (Estes and Freeman) also received award checks for sponsoring a new employee who stayed more than 6 months, a period that becomes significant in the light of Respondent's turnover record. At the end of 1991 Respondent had 109 production and maintenance employees. At the end of 1992 there were 85 but, during 1992, 108 individual employees were discharged.

Carol Chamberlain testified that during 1992 Respondent had an evaluation program that was performed monthly with respect to an employee's attendance, their job, and a section on the employee's strength and weaknesses. Every dischargee testified that they had received good reports on their evaluations. No evidence to contradict this testimony was introduced, because (according to the testimony of C. Chamberlain and Krebs) Respondent ''threw away'' all evaluations. Otherwise, however, Glen Lesnau, a former manager of metal fabrication, testified that shortly after he went to work for Respondent on October 12, he was in the process of considering one of the employees to be an assistant. Another manager indicated to Lesnau that this particular employee had some ''behavioral irregularity,'' which caused Lesnau to look into the employee's personnel file where he observed a personal evaluation on that particular employee.

An examination of the personnel files of the 10 dischargees reveals some warnings but also shows that they were not candidates for outright discharge under its handbook policies, however, Krebs testified he didn't bother to review their personnel files before making the decision to fire them.

The dischargees were among Respondent's highest paid employees and they all received an across-the-board raise 8 days before being terminated. According to C. Chamberlain, the highest paid production employees are the toolmakers at $13.75 per hour. Next came the operators of the roll-forming machines like Gary Estes, who was paid $8.70 per hour, after September 1. Then come the welders at $8.10 per hour. Among the dischargees who were paid that rate were: Jeff Smith, Jeff Rice, Homer Stamper, Johnny Gentry, and Garrett Neace. The discharged employees testified that they met

their production quotas, except for those occasions when their machines broke down or when there was a lack of raw materials for production.

Lastly, it is noted that dischargee Estes spoke with Krebs on three occasions where he sought to move to improve himself and get a better job and was successful in moving from the mig welder to roll forming in January 1992. He also alerted his supervisor, Krebs, and C. Chamberlain to an employee who was using drugs in the bathroom, but no action was taken by Respondent.

III. DISCUSSION

The issues in this case arose when the Respondent suddenly terminated 10 employees without cause, telling them that it didn't have to give a reason or otherwise telling them that the Company would be better off finding someone better to do the job for the same money. These discharges occurred 15 days after an initial union organizational meeting at the home of 2 of the dischargees and shortly after 9 of the 10 dischargees had signed union authorization cards. Although one union representative testified in corroboration of the start of union activity, after the discharges all organizational ceased, the Union apparently abandoned the discharged employees and they pursued a charge with the Board on their own.

A. *Alleged Threat and Credibility*

James Myers credibly testified that while he was at a meeting with Manager Kreb and a group of supervisors on September 8, Krebs said he had heard rumors of a union in the plant and that it was his considered opinion that if a union was voted in Owner Chamberlain, who he had to deal with every day, would close the plant. As pointed out by the General Counsel, Myers is still working for Respondent as a rank-and-file employee (not a supervisor), his testimony was adverse to Respondent and, therefore, he placed himself in considerable peril of economic reprisal and for that reason his testimony is not likely to be false. Otherwise, I find that he testified with a believable demeanor and that his overall narrative of the meeting with supervisors and a subsequent meeting with Krebs is highly coherent and plausible. Krebs on the other hand presented a brash demeanor and was impatient with detail, yet he admitted at least the substance of what Myers said he heard, by testifying (with uncharacteristically obscure verbiage), to the effect that if problems with respect to the ''labor'' content of the products being produced in material handling could not be brought down, the Company could not continue to make investments in this portion of the business and that could ultimately lead to the entire operation going down. Under these circumstances, I find that Myer's testimony should be credited over Krebs in all aspects where their testimony may differ.

Otherwise, the Respondent contends that the statement by Krebs was mere speculation or personal opinion and was de minimis. Here, although it is probable that Kreb's initially and carelessly thought he was just speaking to a group of supervisors, he otherwise attempted to attribute portions of his later meeting with Myers to the meeting with the supervisors, claiming that Myer's brought up the subject of a union in the plant. Although Myers agrees he brought up the ''union'' at the second meeting, I find that Krebs originated the subject in the supervisors' meeting. Krebs did not qualify the statement as ''only'' his personal opinion but embellished his comment with ''considered'' opinion and the implied fact that he knew the owner's thoughts well, words designed to give credence to his statement as a fact, not a mere personal prediction. Also, I find the fact that Myers did not mention the second meeting in his affidavit to be immaterial, see *Gold Circle Department Stores*, 207 NLRB 1005 (1973). Here, the credible threat of plant closure if a union came in was made to an employee and it was not credibly tied in with objective facts regarding economic conditions, and I find that it was objectionable conduct which violates Section 8(a)(1) of the Act, as alleged.

Inasmuch as Krebs also gave testimony in which he denied knowledge of union activity and asserts other reasons for terminating the 10 involved employees, his testimony must be evaluated in determining the Respondent's true motivation and reasons, some further comment regarding Krebs' demeanor and credibility is appropriate at this point.

Gentry, the last employee fired, testified that when he accused Krebs of doing it because of the Union, Krebs smirked, shrugged his shoulders, and raised his hands (Gentry demonstrated how Krebs had reacted). I observed that while Krebs (who had not observed Gentry's testimony) was testifying in response to another area of inquiring, he responded with physical movements which duplicated Gentry's description and demonstration. I find that this confirms and makes Gentry's testimony appear to be highly believable. I therefore credit Gentry's testimony in this respect and I find that Krebs' arrogant response to Gentry and his lack of a denial is an element which supports an inference that Gentry's accusation was accurate.

Billy Willis is a former factory employee who was injured on the job in 1992. She was off work for 3 weeks, placed on light duty as a receptionist when she returned, and then terminated about August 22, in accordance with Respondent's policy because she could not physically return to her former job. She testified extensively regarding Krebs' deportment at the plant and indicated that Kreb's consistently behave boorishly: telling employees they were stupid morons, idiots, were all replaceable, any moron could do this job, did not care if they all hated him, and that the men were ''a bunch of pussys.'' At a meeting he also spit food on the floor and hollered for the employees to get their ''goddamn asses up there, sit down, and shut up.'' He then proceeded to address the employees, including a couple of religious women with repeated use of the phrase ''fuck this,'' and he was described as a hostile, arrogant man that used that phrase or word as part of his everyday language.

This credible testimony is corroborative in nature and tends to demonstrate that Krebs in fact had a hostile, arrogant demeanor which embraced a substantial disrespect for employees in general. This disrespect relates to Krebs' asserted reasons for his actions and his denials that certain events described by other witnesses occurred. This demeanor, although not as flagrant during his testimony, was readily observable and reflects adversely on his overall credibility. Under these circumstances, I will not credit his testimony where it conflicts with the otherwise credible testimony of other witnesses, with circumstantial evidence, or with influences draw from other facts of record.

B. *The Mass Discharge*

In a discharge case of this nature, applicable law requires that the General Counsel meet an initial burden of presenting sufficient evidence to support an inference that the employee's union or other protected, concerted activities were a motivating factor in the employer's decision to terminate him. Here, the record shows that Respondent's management was aware of union activity prior to the actual discharges. Specifically, knowledge of union activity was admitted to by Krebs in the supervisor's meeting on the afternoon of September 8, prior to the first discharges. That same afternoon, Krebs asked Myers if he knew the identity of any union activist but did not pursue the matter when Myers didn't answer. As noted, when Gentry was terminated on September 9, Krebs did not deny his accusation that it was because of the union and I find that Krebs' smirk and shrug (in the context of Krebs arrogantness and his statements that those employees were ''at will'' and he didn't have to give a reason) is an implicit admission that Gentry was correct. Also, I credit Sales Manager Miller's testimony that on September 9 either Owner Chamberlain or Krebs answered his questions about why they were firing people when they had a new order and didn't have enough people to run last months job with the response that ''there was a union improvement that had to be nipped in the bud.''[2]

In addition to these incidents demonstrated by direct evidence, there are a number of factors demonstrated by persuasive circumstantial evidence which satisfies the traditional indicia by which the Board may infer antiunion motivation on the part of Respondent. These inferences are further supported by Manager Krebs' statement (and illegal threat) that the owner would close the plant if a union came in. This conclusion is supplemented by Respondent's attitude towards union as expressed in its January 1992 handbook (which each employee had to sign and agree that he was expected to observe all the policies), which states: ''Our Company is a non-union organization and it is our desire that we always will be.'' Interestingly, this same section request that if the employees have any questions relating to the subject of unions, they be brought to the attention of a supervisor.

Here, although there is no direct evidence that any particular individual was identified to management as a union supporter, I infer that one or more persons did respond to the ''request'' in the handbook and did bring questions and information of this nature to supervisors in the period between the first union organization meeting on August 24, and Respondent's September 8 decision to terminate 10 employees. Although the dischargees made no overt efforts to solicit authorization cards on the plant floor, they did distribute and sign cards in the parking lot on and after September 2 and a total of about 30 signed cards were obtained in response to these initial solicitations. I infer that it is more than coincidental that most of the discharges were the initiators of that organizing campaign or had talked about and handed out numerous authorization cards. Moreover, all but Garrett Neace had executed authorization cards themselves and also had encouraged others to sign. Neace testified he had not yet been given a card when he was fired but that he had frequently discussed and expressed his belief that a union was needed with a group of about 10 other welders, both before and after work and in the cafeteria at lunchtime.

As pointed out by the General Counsel, the Board and the courts have long held that, absent a reasonable explanation, the disproportion between the number of union and nonunion employees laid off or discharged may be persuasive evidence of discrimination; citing *Otis L. Broyhill Furniture Co.*, 94 NLRB 1452, 1453 (1951); *NLRB v. Dinion Coil Co.*, 201 F.2d 484, 486 (2d Cir. 1952); *NLRB v. Shedd-Brown Mfg. Co.*, 213 F.2d 163, 174 (7th Cir. 1954); *Maxon Construction Co.*, 112 NLRB 444, 458 (1955); *Ballou Brick Co. v. NLRB*, 798 F.2d 339, 343 (8th Cir. 1986), where the court noted that it is not necessary for the General Counsel to prove the employer's knowledge of a specific employee's opinion as to the union, when there is a mass layoff for the unlawful purpose of discouraging union membership. See also *Alliance Rubber Co.*, 286 NLRB 645, 647 (1987); and *Superior Coal Co.*, 295 NLRB 439, 455–458 (1989).

Here, the evidence shows that only 15 days lapsed from the first union meeting at the home of Brown and Estes until the discharges began. Although Krebs claimed that he had been dissatisfied with a number of unspecified employees since June 1992, he admitted that he did not draw up the list of names of employees to be discharged until ''the first part of September,'' the time when union cards were being circulated. Under these circumstances the timing and close proximity of union activity and a mass discharge of union adherents is indicative of antiunion motivation; see *Mini Togs, Inc.*, 304 NLRB 644 at 648 (1991); *Vemco, Inc.*, 304 NLRB 911, 912 (1991). This is especially true where the timing of the discharges is not explainable (as further discussed below).

Here, Respondent's actions in firing people on September 8, immediately after selecting 10 employees that it assertly felt it could do without, despite its further assertion that these persons were selected as a result of an ongoing evaluation that had begun in June, is completely implausible in view of the fact that they were given absolutely no warning or notice, were fired in midweek (with full pay for the week), shortly after starting their shift and were not allowed to finish their day, let alone the 3 or 4 days left in the week. The haste with which Respondent acted is emphasized by Krebs' treatment of employee Cook who was completely surprised by the action because he thought (accurately), that he had met production quotas and attendance guidelines, and questioned why he was fired and was told by Krebs: ''just leave the building.'' ''I don't have to give you a reason. Now, get out of my building . . . just get your stuff and get the hell out of my building,'' because, as Krebs admitted ''I wasn't interested in spending any more time discussing reasons.''

The haste with which Krebs acted (with the concurrence or encouragement of Owner Chamberlain) was so extreme that Carol Chamberlain, the Company's personnel manager, who had supplied Krebs with attendance records, said did not know on September 8 the names or reasons why these 10 employees were selected. Accordingly, I find that this haste

[2] Although Miller left the Respondent in January 1993 after Chamberlain proposed to reduce his compensation. I do not find that this rises to a level that would infer a reason to fabricate testimony on Miller's part. Otherwise, Miller's demeanor and testimony were credible and I find the fact that he remained to observe the rest of the hearing after his own testimony to be irrelevant inasmuch as he was not observed to be in an obvious close relationship with any of the alleged discriminatees.

and secrecy must be inferred to be because of the unlawful motivation behind Respondent's action.

Although the Respondent's past practices evidenced that reasons were set out in company records to explain why discharges or separations occurred, this was not done with these 10 dischargees and no reason was placed on their records or was given to the employees other than Kreb's' bland statements to some that he could find someone better to do the job. This failure to give a meaningful reason is indication that the true reason is invalid, see *Accurate Die Casting Co.*, 292 NLRB 982, 992 (1989), and the failure of any supervisor or manager to warn of alleged deficiencies prior to discharge[3] is also a factor that supports an inference that Respondent's reason that it wanted to find a ''better'' person is pretextual and that its real motivation was illegal in nature. Compare *Federal Screw Works*, 310 NLRB 1131 (1993), where employees were given a pretextual 30-day notice for a purported opportunity to make corrections relative to their ''poor'' evaluations before ''the possibility of discharge.''

As discussed further below, the Respondent's failure to give any plausible, objective reason in defense of its actions and its attempted reliance on Kentucky's ''at will'' law under which it purports that employees can be validly fired for no reason is a further indication of the pretextual nature of the ''no reason'' claim and is indicative that the real reason was a ''bad'' reason. Under all these circumstances, Krebs' denial of relevant knowledge is neither credible nor persuasive and I find that the Respondent knew that union activity had just started at its plant, it had some idea of who was involved and it was motivated by its knowledge of a ''union movement'' that ''had to be nipped in the bud,'' to discharge the suspected employees.

Otherwise, when circumstances demonstrate a mass discharge for unlawful purposes, as here, it is unnecessary to show employer knowledge of union activity of each specific dischargee, see the *Federal Screw* case supra, and I conclude that the General Counsel has established a strong prima facie showing that union activity was a motivating factor in the Respondent's decision to terminate this group of employees. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

Once the General Counsel establishes a prima facie case, the burden shifts to the Respondent to show that it would have taken the same action even in the absence of union considerations. In light of the General Counsel's strong prima facie showing, the Respondent's burden here is substantial, see *Vemco, Inc.*, 304 NLRB 911 (1991). Accordingly, the testimony will be discussed and the record evaluated to consider Respondent's defense and, in the light thereof, whether the General Counsel has carried his overall burden.

Respondent contends that the discharges would have taken place even in the absence of union activity because the employees were ''at-will'' employees who could be discharged at any time for any reason, that it was ''privilege'' to discharge them for the good of the business whether or nor they had violated company policies such as those on attendance, and that Krebs merely decided to terminate these 10 persons he had selected because he thought the Company could hire someone to do the job as well, if not better.

Paradoxically, Respondent contends that the certificate signed by each employee that he received an employee handbook is not a ''contract'' giving the employee any employment rights yet, at the same time, is an understanding on which the employer may rely for the right to terminate ''for any reason at any time.'' On brief, Respondent attempts to avail itself of benefits of the employees' ''certification'' by asserting that it therefore was privileged to discharge employees whether or not they had violated any specific policy in the handbook, such as the attendance policy.

Here, it appears that Respondent had misunderstood or misapplied its asserted ''privilege'' under Kentucky law. Although ''at-will'' employees could traditionally be discharged for ''good cause, no cause, or a cause that some may view as morally indefensible'' that privilege does not extend to dischargees that otherwise fall within the jurisdiction of the National Labor Relations Act.

Moreover, it appears that even under Kentucky law, the ''at-will'' relationship can be modified where, as here, the employer provides the employees with a handbook with categories of offenses, provisions that establish cause for repeated offense, and a system for progressive discipline, see *Norris Filson Care Home Ltd.* (Kentucky Commonwealth Court of Appeals, 1990), 115 LC § 56,244, which finds that under such circumstances, there is evidence of a probable contract that requires discharge for cause only.

Respondent's self-serving disclaimer aside, its handbook clearly sets forth a progressive discipline system that Krebs chose to ignore in his apparent zeal to purge the Company of union sympathies. The Respondent also chose to ignore the assertation in its handbook that: ''Management is committed to making all reasonable efforts to maintain continuous employment.''

Here, none of the discharged employees had exceeded the disciplinary guidelines and two, Brown and Neace, not only had no apparent warnings but, in fact, were selected as recipients of company ''Leader'' recognition in late June. Yet, only a little more than 2 months later, they were selected by Krebs to be purged as persons who could be replaced by anyone hired off the street. Despite the Respondent's strange belittlement of its own awards programs that recognized Brown and Neace, as well as Cook, Estes, Freeman, Stamper, and Peach, none of the employees were shown to be less than average employees and, in fact, they basically all had good productivity records and several were told at their discharge that they were good workers or that the discharge had nothing to do with their work performance, just that the Company felt it would be better off without them.

Krebs took full responsibility for the selection of the people, yet he specifically did not examine the personnel files of any of his candidates other than to get attendance data

[3] In some instances some of these employees received warning slips that indicated that because of tardiness or absence they would have to make a considerable effort to improve during the remainder of 1992 if they were to remain employed. Yet, as otherwise discussed herein, they did not actually reach the level of violation that would call for discharge under the rules in the 1992 handbook and they were not specifically discharged for this reason. Also, Stamper was given a first warning for disobedience on September 2 which stated ''the next time you will be automatically discharged,'' for leaving his workstation without approval (he went to the men's room after he could not find a supervisor).

from Carol Chamberlain. Although one person was one absence short of the 5 handbook number for discharge, he had not exceeded that number and the others were not untypical of the overall work force. At the most, Krebs relied upon his subjective feelings that these employees were inconsistent or were not interested in improving themselves or the area they were working in. These are not objective reasons and in fact are refuted to a substantial degree by the work records of many in the group. Significantly, Krebs did have an available objective tool under which he could evaluate employees during the summer of 1992 when he assertedly became specifically concerned with the idea to purge a number of the less desirable employees. This tool was the employee evaluations, evaluations that Krebs dismisses as being merely a communication device between management and employees. The employees all credibly testified they received good evaluations, however, at some point in time, Respondent assertedly just ''threw away'' all evaluations and none were provided in response to the General Counsel's subpoena. It appears likely, however, that some evaluations were still in personnel files as late as October 1992, when the manager of metal fabrication, Glen Lesnau, credibly testified that he saw the evaluation of an employee in a personnel file when he was investigating one of his worker's behavioral history.

No actual replacements had been interviewed or selected at the time of the discharge and, in view of Respondent's extreme turnover rate (numerically over 100 percent, in 1992), and its obvious inabilities or difficulties in hiring and retaining employees (note its ''sponsor'' awards to employees who get another person to stay at least 6 months), Krebs asserted premise for his and the Company's actions appears to be inherently incredible. This is especially true when it is considered in the light of the fact that Respondent was short of workers for its regular production in August 1992 had just received a new order, the largest order in its history (which ultimately proved to be a $1.8 million-per-year order), that more than doubled Respondent's metal-stamping operations.

After confirmation of the order, Chamberlain held a meeting of all employees and managerial personnel and announced that this new order would mean hiring 13 to 15 additional employees. As noted above, Sales Manager Miller, who had obtained this new order, strongly protested about the effect of the termination of experienced people when Respondent didn't have enough people to run its existing orders and these concerns are not answered by Respondent's explanation that it didn't reach peak production on the new order until November and that the dischargees worked in ''material handling'' not in the ''metal fabrication'' department that handled the new order. Here, the record shows that Smith was a welder and fabricator since 1988 (with the predecessor company), Brown was initially inexperienced but was successfully trained to be a resistance welder, Cook was a machine operator experienced on at least five different machines, Stamper and Rice were welders, Estes was a roll former, Peach was a mesh welder and maintenance operator, Freeman was a machine operator, Gentry was a mesh welder (also with the predecessor company), and Neace was a welder and fabricator (also with the predecessor company). Accordingly, Respondent's claim that these experienced employees were from another department fails to explain why they wouldn't be as suitable for the needed new positions as persons hired off the street. Otherwise, Respondent offers no plausible reason why it chose the last shift Tuesday (and first shift Wednesday) to suddenly implement a discharge program it has purportedly been planning for several months. There is no plausible reason offered to show why it would blindly go forward with these plans (during midweek) when it was faced with new orders and a need for a significantly larger work force. And, with Respondent's extreme record of employee turnover during all of 1992, Respondent was still advertising for welders in January 1993, when Carol Chamberlain declined to consider Homer Stamper for reemployment.

These surrounding circumstances, if anything, show Respondent's reasons to be pretextual and otherwise to be so unpersuasive that Respondent clearly does not satisfy its burden to show that it would have discharged these employees even in the absence of union activity. Here, despite the existence of some ''objective'' criteria based on evaluation (that it ''threw away'' and a handbook system of progressive discipline), the Respondent chose to rely on Krebs subjective opinion that employees ''better for the company'' could be found on the outside. In substance, Respondent's justification is that it does not need a reason because the dischargees were ''at will'' employees and that it wanted to take a chance on getting better employees off the street. Here, it would appear that Respondent's justification'' better for the company'' is an euphemism for employees ''who were not union activist or supporters.'' This ''reason'' is pretextual and it otherwise does not satisfy Respondent's burden to rebut the General Counsel's strong prima facie showing. Accordingly, I conclude that the General Counsel has met his overall burden and shown that the Respondent's mass discharge of employees at the start of an abortive union campaign violated Section 8(a)(1) and (3) of the Act, as alleged.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening an employee that the owner would close the business if a union came in, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By discharging Tracy Brown, Keith Cook, Gary Estes, and Jeff Rice on September 8, 1992, and Mark Freeman, Johnny Gentry, Garrett Neace, Roger Peach, Jeff Smith, and Homer Stamper on September 9, 1992, because of the employees' union activities, Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

With respect to the necessary affirmative action, it is recommended that Respondent be ordered to reinstate each of the discriminatees to their former jobs or substantially equivalent positions, dismissing, if necessary, any temporary employees or employees hired subsequently, without prejudice to their seniority or other rights and privileges previously en-

joyed, and make them whole for any loss of earnings they may have suffered because of the discrimination practiced against them by payment to them a sum of money equal to that which they normally would have earned from the date of the discrimination to the date or reinstatement in accordance with method set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1773 (1987).[4]

The Respondent also shall be ordered to expunge from its files any reference to the illegal discharges and notify them in writing that this has been done and that evidence of the unlawful discharges will not be used as a basis for future personnel action against them. Otherwise, it is not considered necessary to issue a broad Order.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, American Wire Products, Inc., Frankfort, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening any employee with plant closure if a union comes in.

(b) Discharging any employee for activity protected by Section 7 of the Act.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Tracy Brown, Keith Cook, Gary Estes, Mark Freeman, Johnny Gentry, Garrett Neace, Roger Peach, Jeff Rice, Jeff Smith, and Homer Stamper immediate and full reinstatement and make them whole for the losses they incurred as a result of the discrimination against them in the manner specified in the remedy section of this decision.

(b) Remove from its files any reference to their discharges and notify them in writing that this has been done and that evidence of the unlawful discharge will not be used as a basis for future personnel actions against them.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Frankfort, Kentucky facility copies of the attached notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[4] Under *New Horizons*, interest is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''